

# Specialisation in Construction Law and Arbitration

by

Professor Vincent Powell-Smith,

LLB (Hons), LLM, DLitt, FCI Arb, AIArbA, DSLP (IIU)

## THE MALAYSIAN MUSLIM LAWYERS ASSOCIATION

### Introduction

Specialisation is PRESENT in many common law jurisdictions. By specialisation I mean not merely concentration in a INTERNATIONAL SEMINAR expertise in it. We

should not describe a practitioner as a specialist in a part PROFESSIONALISM AND SPECIALISATION IN LAW PRACTICE IN MALAYSIA: CHALLENGES AND PROSPECTS IN THE COMING DECADE specially expert in it. In both arbitration and construction law in-depth knowledge of both the law and the practice is

### SPECIALISATION IN CONSTRUCTION AND ARBITRATION LAWS

BY

Professor Vincent Powell-Smith  
University of Malaya  
Kuala Lumpur

heavily for many years on a particular field - usually one which involves a great volume of repetitive and relatively simple work - and yet has developed no particular expertise in it. The difficult field can then be

PAN PACIFIC HOTEL  
KUALA LUMPUR

1. Since 1991 the University of Malaya has offered both arbitration and construction subjects at LLM level and, thankfully, the majority of the students have been practitioners, many of considerable practical experience. The University also offers other specialist subjects including intellectual property law, insurance, and securities regulation.

10TH JUNE, 1993



## Specialisation in Construction Law and Arbitration

by

Professor Vincent Powell-Smith,

LLB (Hons), LLM, DLitt, FCI Arb, AIArbA, DSLP (IIU)

### Introduction

Specialisation is the norm in many common law jurisdictions. By specialisation I mean not merely concentration in a field of law but also expertise in it. We should not describe a practitioner as a specialist in a particular field unless we consider that he or she is specially expert in it. In both arbitration and construction law in-depth knowledge of both the law and the practice is required and this is acquired only by study and experience. My remarks about specialisation are thus confined to these areas, but some of my comments will be of application to other more esoteric fields.<sup>1</sup>

Concentration in a particular field is likely to develop one's expertise in it but will not necessarily do so. All of us know of cases where someone has concentrated heavily for many years on a particular field - usually one which involves a great volume of repetitive and relatively simple work - and yet has developed no particular expertise in it. The difficult problems in the field can then be

---

1. Since 1991 the University of Malaya has offered both arbitration and construction law as subjects at LLM level and, thankfully, the majority of the students have been practitioners, many of considerable practical experience. The University also offers other specialist subjects including intellectual property law, insurance, and securities regulation.



in London the nominated judges sit full-time and deal with referred to other practitioners. Today there is little doubt that both construction law and arbitration are distinct legal disciplines and, of the former it has been said that "the practitioner who seeks to rely on general principles alone will be navigating sometimes dangerous waters without chart and compass".<sup>2</sup>

Specialisation has developed for a variety of reasons, of which the most significant is that of client demand. The constantly increasing complexity of many branches of the law creates continual problems for business and industry. This in turn inevitably gives rise to a demand for skilled specialist legal advice in particular areas.

In England, every aspiring barrister is advised of the choice between general practice in common law chambers and the option of 'specialist chambers'.<sup>3</sup> The aspiring specialist barrister has a wide choice : company law, commercial law, construction law, intellectual property law, libel law, and shipping law are examples.

The same position prevails in Australia<sup>4</sup>, where many lawyers specialise in particular fields of work and, as in the United Kingdom, there are effectively specialist courts.<sup>5</sup> They may hold trials at any convenient place, and

-----  
2. Emden's Construction Law, 8th edn., revised, London, 1990, Vol. 1,, para. [5]-[10]. This loose-leaf work now extends to five substantial volumes and is kept updated by quarterly supplements. A better general text is Keating on Building Contracts, [Ed. May], 5th edn., London, 1991.

3. See, for example, Professor Glanville Williams' classic Learning the Law, 11th edn., London, 1982, Chapter 13. This superb book, from which even senior lawyers can profit, is happily now available in Bahasa Maleyu translation.

4. See Disney, J. et.al., Lawyers, 2nd edn., North Ryde, 1986, Chapter 6.



in London the nominated judges sit full-time and deal with the majority of building contract and other construction law actions. Many seminal common law decisions are decided at first instance by official referees who are de facto High Court judges in practice if not in name and status.<sup>6</sup>

The position is the same in some of the Australian jurisdictions : for example, in New South Wales there is a "Construction Law List" in the Common Law Division of the Supreme Court and the same position prevails nearer home in Hong Kong.<sup>7</sup> Alongside these specialist Courts there exists in the various jurisdictions a specialist 'Construction Bar' and, where the legal profession is divided, as it is in the United Kingdom, many firms of solicitors in London and the provinces have large and flourishing 'Construction Law

-----  
5. In England and Wales there is no "Construction Law Court" under that title, but the bulk of construction law cases are disposed of by the 'Official Referees' who are Circuit judges, deputy Circuit judges or recorders nominated by the Lord Chancellor to deal with 'official referees' business' under s. 68(1) of the Supreme Court Act 1981, as amended. See Fay, E. Official Referees' Business, 2nd edn., London, 1988; Newey, J. Official Referees' Courts - Practice and Procedure, London, 1989; Fox-Andrews, J. "Practice Today in the Official Referees' Courts" (1989) 5 Const.L.J. 246; Newey, J. "The Preparation and Presentation of Cases in the Official Referees' Courts" (1990) 6 Const.L.J. 216.

6. For example, Murphy v Brentwood District Council [1990] 3 WLR 414; (1990) 21 ConLR 1, which revolutionised the law of negligence, was a construction law case which started off in the Official Referees' Courts.

7. In Hong Kong the Construction Law List is presided over by Mr Justice Neil Kaplan who combines in his person specialist knowledge of both construction law and arbitration. For a survey of specialisation in New South Wales see the Third Report on the Legal Profession, New South Wales Law Reform Commission, 1982. Specialisation is also common in the United States : see Laumann, E. and Heinz, J. Specialisation and Prestige in the Legal Profession : The Structure of Deference, Chicago, 1977.



Departments'.<sup>8</sup> This pattern is now emerging in Malaysia where many lawyers have acquired specialist knowledge of and expertise in the related<sup>9</sup> areas of arbitration and construction law. This is a trend which I believe will continue. Both construction law and arbitration law are evolving subjects. Major economic growth and development - and the construction industry has a key role to play in Malaysia's expansion - inevitably involves conflict and in turn this requires an efficient system of disputes resolution. Litigation is now - to outward appearances at least - the traditional common law method of resolving disputes. It is not necessarily the best and most efficient way of solving commercial and legal problems, whatever the litigation specialists may say. And the court waiting lists may be long : "Justice delayed is justice denied".

#### Advantages of specialisation

A major advantage from the client's point of view is

-----  
8. There are also in the U.K. and Australia specialist interest groups, such as The Society of Construction Law as well as specialist series of law reports and journals, e.g., Building Law Reports, Construction Law Reports, Construction Law Journal, and Building and Construction Law. This year will see the issue by Butterworths Asia of the first volume of Asia-Pacific Construction Law Reports which will report major judgments from the Courts of Malaysia, Singapore, Hong Kong, Australia and New Zealand.

9. In practice, if not in theory, because arbitration is the chosen method of disputes settlement under almost every building and civil engineering contract whether of local or international provenance. Internationally, businessmen instinctively prefer an 'out of court settlement' and arbitration and other forms of alternative dispute resolution ('ADR') techniques are used : see Redfern and Hunter's International Commercial Arbitration, 2nd edn., London, 1991 which, perhaps provocatively in view of its title and coverage, contains no reference to arbitration under Shariah.



that of quality of service. A practitioner who is specially familiar with construction law is less likely to be unaware of or to misinterpret the relevant law and practice. This is of especially importance when dealing with construction contracts which are couched in language of the greatest complexity, even if they remain firmly within the ambit of the general common law. They also involve complex concepts and relationships which prove a quagmire for the unwary.

Detailed knowledge of the special procedures and personalities and practices in a particular field is also of vital importance. If there is an arbitration clause in a contract - normally to be appointed by agreement - knowledge about suitable arbitrators is essential. This specialist knowledge arises even at the drafting stage of a contract : if it is decided that there should be an arbitration agreement, consideration must be given to who is to appoint the arbitrator in default of agreement.<sup>10</sup>

These advantages of specialisation are increasing in significance because of the diversity and growing complexity of Malaysian society. The rapid changes in law and technique in construction law and arbitration, as well as in many more traditional fields, have made it increasingly difficult for any practitioner to provide skilled services across a wide range of areas.

Specialisation also enables lawyers to restrict their

-----  
10. In Malaysia, where there is an international contract, the problem is solved by making the Director of the Regional Centre for Arbitration, Kuala Lumpur, the appointor. There may, however, be dangers in doing this in the case of domestic contractors as problems may arise when it is sought to enforce the Award.



work largely to those fields which interest them most or to which their talents are best suited. Increased job satisfaction can improve greatly the quality of a practitioner's work.<sup>11</sup>

Specialisation can also save time and money for practitioners.<sup>12</sup> If you have dealt with a particular type of problem you are likely to need less time to research and consider the relevant law and practice. Specialisation can also lead to greater efficiency by the development of libraries, a data base of precedents, specialist training and so on.<sup>13</sup> It also saves (or should save) time and money for the clients. Even if it does not, and specialisation improves the quality of service, any increase in fees borne by the client will often be outweighed by the benefit of, for example, winning a case which cheaper but less expert service would have lost.

There is also, I believe, another potential advantage, if the idea can be sold to the client. The specialist should be a problem preventer rather than a problem solver. Many of the disputes in the construction field arise because inappropriate contract documentation is used. "Building contracts" are often drawn up by legally unqualified

---

11. The cynic might say that the specialist may also command higher fees. This is certainly true in the U.K. where I recently saw a Brief marked with a fee of RM200,000 equivalent with a 'refresher' of RM20,000 a day.

12. A point evidently not overlooked by the Government when it established a specialist Arbitration Unit within the Attorney-General's Chambers.

13. Again, the Faculty of Law of University of Malaya has taken the lead with the introduction of its Legal Education Extension Programme.



91

people<sup>14</sup> or, where standard forms are used, inappropriate amendments are made. Of these is the stuff of the leading cases. These simple examples could be multiplied.

### Arbitration as a specialism

The general principles of arbitration law are easy to grasp even though the subject does not appear to be taught at undergraduate level. But this statement applies only at an elementary level because arbitration is an international 'growth industry' and arbitration law is in a state of development.<sup>15</sup>

Some of the major advantages of arbitration as opposed to litigation may be said to be the speed of decision making, potential savings in cost, choice of tribunal and privacy. The first two advantages are immediately lost when non-specialist practitioners become involved because<sup>16</sup>, unless the arbitration is conducted under specialist procedural Rules such as those of the Regional Centre for Arbitration, the general practitioner inevitably wants the procedure to follow that of the High Court.<sup>17</sup> The Rules of

-----  
14. Notably by quantity surveyors !

15. Particularly in England, as a glance at any issue of Lloyds Law Reports will show. Although the recent English decisions are not binding on our Courts, they remain persuasive, especially since the Arbitration Act 1952 is virtually in pari materia with the English Act of 1950 in its unamended form. The standard textbook is now Mustill & Boyd's Commercial Arbitration, 2nd edn., London, 1989, although Malaysian users should bear in mind that currently there are significant differences between the Malaysian and English positions.

16. This view is based on my practical experience as an arbitrator and that of many arbitral colleagues throughout the common law world.



the High Court 1980 are in fact unsuited to many types of arbitration and there have been major developments in arbitral techniques and practice with which only the specialist is familiar.<sup>18</sup> For example, the arbitrator is free to break from the traditional manner of putting evidence before the court, i.e., oral evidence, elicited by question and answers. Written statements can be used instead, and the current practice is often to exchange the proofs of evidence of witnesses of fact well in advance of commencement of the hearing. Then, the witness can merely confirm its contents and be subject to cross-examination in the usual way.<sup>19</sup>

Arbitration and its relatives mediation and conciliation are well suited to settlement of commercial disputes in Asia. But the development of these traditional techniques to suit modern needs and circumstances calls for the development of expertise which, in my respectful view, the general practitioner does not possess. As specialisms, arbitration and construction law go hand in hand; I have found them to be challenging areas of interest for more than

-----  
17. It may be added that some of the specialist rules, including those of the Malaysian Institute of Architects (PAM) and the Institute of Engineers, Malaysia (IEM) are manifestly defective in many important respects.

18. They include 'documents-only' arbitrations and other time-saving techniques. For the most up to date survey (with a U.K. bias) see Bernstein, R and Wood, D. Handbook of Arbitration Practice, 2nd edn., London, 1993, especially at 217-256.

19. See, for example, the IBA Supplementary Rules governing the Presentation and Reception of Evidence in International Commercial Arbitration discussed by Shenton, D in Arbitration International, July 1985.



a quarter of a century, and it is on that basis that I  
commend them to you.

93